

## CARPENTIER v. UWAMAHORO

[Rwanda Court of Appeal – RCA 00006/2019/CA (Kanyange, P.J, Ngagi and Gakwaya) March 06, 2020]

*Jurisdiction of courts – Primary Courts – The Court with jurisdiction to hear applications seeking modification or revocation of provisional orders which was issued by a court while presiding over a divorce case at the last instance, after the final disposition of the divorce case on the last instance level – In case a court issued some provisional orders while presiding over a divorce case at the last instance level, if circumstances have changed, the application seeking modification and revocation of those orders are submitted to the Primary Court since it is the one with jurisdiction to try cases related to persons and family at the first instance – Law N° 30/2018 of 2/6/2018 02/06/2018 determining the jurisdiction of Courts, article 27(5)*

**Facts:** Carpentier married Uwamahoro with whom they gave birth to two children. After a long time of misunderstandings, they filed a claim of divorce before the Court, which was granted definitely by the High Court. As provisional decisions, Uwamahoro was given obligations of looking after the children, Carpentier was ordered to pay for alimony and health care in the country of Belgium. Both parties in various time went before the High Court as the Court which rendered the judgment at last instance to request a reversal of some decisions taken before. However, they were not contended by some of those decisions and appealed both before the Court of Appeal. Before examining the case in substance, the Court of Appeal examined in prior whether the High Court which rendered the decision at last instance had jurisdiction to try issues related to no execution of the decisions rendered in those judgments or to reverse some decisions it rendered previously.

The appellants state that the High Court being the one which rendered the divorce case between them and in the latter case it was taken decisions related to children, that High Court has jurisdiction to try all those claims including the appealed judgment.

By responding on that issue, the accused found also that the High Court had jurisdiction to try the appealed judgment because it took decisions in relation to children too, thus it had jurisdiction to try whether to reverse or sustain those decisions.

**Held:** In case a court issued some provisional orders while presiding over a divorce case at the last instance level, (e.g: regarding the maintenance of the children and alimony), if circumstances have changed, the application seeking modification and revocation of those orders are submitted to the Primary Court since it is the one with jurisdiction to try cases related to persons and family at the first instance, thus the decisions taken in judgments RC 00004/2019/HC/KIG, RC 00010/2019/HC/KIG, and appealed judgment RC00023-00024/2019/HC/KIG are quashed, the interested party has to file a new claim before the competent.

**The High Court has no jurisdiction to try the appealed judgment. Orders taken in judgments N° RC 00004/2019/HC/KIG, N° RC 00010/2019/HC/KIG, and N° RC00023-00024/2019/HC/KIG are quashed.**

**Statutes and statutory instruments:**

Law N° 30/2018 of 2/6/2018 determining the jurisdiction of courts, article 27 (5)

Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, article 194

Law N° 32/2016 of 28/8/2016 governing persons and family, article 243.

**No cases referred to.**

## **Judgment**

### **I. BACKGROUND OF THE CASE.**

[1] Carpentier Raymond Marcel Patrick married Uwamahoro Dalida Waldha with whom they gave birth to two children namely Carpentier Patrick Junior and Carpentier Carl Philippe. They were divorced afterward by the judgment RCAA00013/2018/HC/KIG rendered by the High Court on 7/12/2018, Uwamahoro Dalida Waldha was ordered to look after the children, whereas Carpentier Raymond Marcel Patrick was ordered to pay for alimony, the latter has also vested the rights to take children to Belgium for medication as he requested, but he will be escorted by Uwamahoro Dalida Waldha, the Court ordered them also to share their property.

[2] After the adjudication of the case RCAA00013/2018/HC/KIG by the High Court, Carpentier Raymond Marcel Patrick came back to that Court praying it to reverse the decision taken regarding the children, to examine the rights for the children as their medication abroad is concerned, their alimony and their right to visit their both parents equally. In the judgment RC00004/2019/HC rendered on 20/2/2019, the High Court decided with merit the claim of Carpentier Raymond Marcel Patrick, it decided about the time to visit or to be visited by his children. It decided that he will be taking them during the weekend, from Friday 11 a.m and return them to Uwamahoro Dalida Waldha Sunday at 4 p.m, whereas, regarding the right to look after the children and taking them for health care, it was decided with no merit his requests, rather, it sustained the decision of the judgment RCAA00013/2018/HC/KIG aforementioned.

[3] Carpentier Raymond Marcel Patrick filed another claim before the High Court stating that there is a negative change regarding the children's rights because it was decided that their mother shall look after them but she hang out more often and leave them alone in the house, that she was ill-behaved because she used to stay out late at night and leave them and that she is a Hiking player which she plays naked, he requested the Court to decide that he should be the one to look after them or to have joint custody of children. He requested also that Uwamahoro Dalida Waldha should take part in the maintenance of the children because she has a job, also that they should jointly pay for their education, because Uwamahoro Dalida Waldha kept the entire property, he requested again to reexamine the right to take children for medical care, because Uwamahoro Dalida Waldha does not have the willingness to provide them with medical care though it was decided by the High Court.

[4] In the judgment RC00010/2019/HC/KIG rendered on 14/6/2019, the High Court decided that Carpentier Raymond Marcel Patrick will take their children Carpentier Patrick Junior and Carpentier Carl Philippe to medical care in Belgium and all related requirements, and had to bring

them back not later than 6/8/2019. He was also given the right of custody of the children, up to 6/8/2019, after that date they should be in the custody of their mother as usual.

[5] Uwamahoro Dalida Waldha also filed a claim before the High Court, which was numbered RC00023/2019/HC/KIG, praying the Court to reverse the decisions taken in that case as regards to the maintenance and medical care, but she abandoned some issues she chose to request to Court to order Carpentier Raymond Marcel Patrick to execute the decision as regards to alimony and school fee, without waiting for the judgment to acquire res judicata principle because he performs it the way and time he wants, which is disturbing.

[6] Carpentier Raymond Marcel Patrick also filed a claim before the High court, which was numbered RC00024/2019/HC/KIG, requesting to reverse the decisions taken in judgments RCAA00013/2018/HC/KIG, RC00004/2019/HC, RC00010/2019/HC/KIG for the well being of the children as regards to their maintenance and their medical care, he requested the Court to order for joint custody of the children as an answer to the permanent disputes between him and Uwamahoro Dalida Waldha, and be given the right to take children to Belgium for medical care without their mother's permission, he requested also damages for a frivolous lawsuit and economic loss, like air tickets canceled because she interfered for the children's medication.

[7] Both cases were combined in the case RC00023/2019/HC/KIG-RC00024/2019/HC/KIG, rendered on 11/10/2019. The High Court found Uwamahoro Dalida Waldha's statement that is no longer necessary for the children to get medical care abroad because the sickness of autism which they suffer is incurable, even the ministry of health affirmed that the sickness of autism can be consulted in Rwanda, it found without merit the request of Carpentier Raymond Marcel Patrick that the children may be taken to Belgium without their mother's permission because he did not try and fail to seek for medical care in Rwanda, so that the Belgium medicine may continue where the Rwandan medicine failed from, it decided without merit the claims filed by Uwamahoro Dalida Waldha.

[8] Carpentier Raymond Marcel Patrick was not contended by the ruling of that judgment and appealed before the Court of appeal, he prayed the Court to examine the issue of maintenance of children namely Carpentier Patrick Junior and Carpentier Carl Philippe with regarding joint custody of both parents in the sake of children and means of solving disputes between their parents, examine whether he can take children to Belgium for medical care without their mother's permission Uwamahoro Dalida Waldha, to order the latter to handle Rwandan passports of those children which she confiscated, and examine the issue relating to the parent's right regarding children and vice versa.

[9] The case was scheduled to be heard on 4/2/2020 but was not heard on that day because Counsel Munyaneza Remy, who represents Uwamahoro Dalida Waldha, did not appear to Court and was fined for delaying tactic. The hearing was postponed to 13/2/2020, and parties were requested to prepare submissions regarding the jurisdiction either of the High Court which adjudicated the appealed judgment or the Court of Appeal. The hearing in public happened again on 13/02/2020, Carpentier Raymond Marcel Patrick assisted by Counsel Musasangohe Illuminée and Counsel Kazeneza Théophile, whereas Uwamahoro Dalida Waldha was represented by Counsel Munyaneza Remy, the subject matter is either the jurisdiction of the High Court or that of Court of appeal to hear the appeal claim filed by Carpentier Raymond Marcel Patrick.

## II. ANALYSIS OF LEGAL ISSUES.

### **To know the competent Court to hear issues relating to children after the divorce of the spouses decided in a judgment which acquired the res judicata.**

[10] Counsel Musasangohe Illuminée, who assists Carpentier Raymond Marcel Patrick, states that the appealed judgment and related previous judgments rendered by the High Court basing on article 243 of the Law N° 32/2016 of 28/8/2016 governing persons and family, that the content of that article means that if the Court took the decision based on that article, that decision is provisional, it can be reversed for the interest of the children.

[11] Counsel Musasangohe Illuminée states that based on that article also, the High Court being the one which rendered the judgment on the divorce between Carpentier Raymond Marcel Patrick and Uwamahoro Dalida Waldha, which contains the decisions regarding the children too, which Court rendered also, the judgments RC00004/2019/HC/KIG, RC00010/2019/HC/KIG and judgment RC00023/2019/HC/KIG- RC 00024/2019/HC/KIG, these claims were filed through Exparte application procedure as explained by article 194 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, the High Court had jurisdiction to hear all those claims including the appealed judgment.

[12] Counsel Musasangohe Illuminée states also that, as, regarding the jurisdiction of the Court of appeal, the appealed judgment began before the High Court, before which it was filed an exparte claim as provided by article 189 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure. She states that as children's cases are concerned they have a particularity because they require to indicate the child's interest concerned, thus, any interested person is allowed to request the Court which took that decision to annul it or reverse it for the sake of the children.

[13] Counsel Musasangohe Illuminée states also that, the Court of Appeal has the jurisdiction to hear an appeal the decision rendered by the High Court, because article 192 the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, allow to appeal against the decisions taken in exparte application procedure, thus, the High Court being the one which decided the divorce case and cases concerning children, they have the right to appeal once, which they did.

[14] With regarding the competent Court to hear the exparte application, in relation to family issues and the interlocutory claims, Counsel Musasangohe Illuminée stated that article 189 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that exparte application does not require necessarily a principal claim, that, they filed in beginning a claim regarding a decision which concerns one of the children's parents and not the other, that the Court itself decided to summon the other.

[15] with regarding article 27 of the Law N° 30/2018 of 2/6/2018 determining the jurisdiction of courts, which gives the Primary Court the jurisdiction to hear the issues regarding family and persons, Counsel Musasangohe Illuminée states that in case the Primary Court took the decision for any given issue and which is appealed and reversed in part in the appeal, the party to the case does not return to the Primary Court to request any reversal, because it relinquished the case, with

regarding the current case, the High Court is the one which took the provisional decision, for which they filed a claim for its reversal but they lost the case, the reason why they appealed.

[16] Counsel Kazenzeza Théophile, who also assists Carpentier Raymond Marcel Patrick, states that the decisions taken by the judge regarding the children don't have a principal claim, he/she can annul or reverse them, that, the legislature provided for *exparte* application to file them, and can be appealed. He states that the Primary Court judge to whom the *exparte* application is filed against the decision taken by High Court can argue that, he/she does not possess the concerned file and has no jurisdiction to reverse the High Court decision.

[17] Counsel Kazenzeza Théophile states also that, whereas the Court of Appeal will hear this case, it will require to file a claim before the same Court for the decision taken to be reversed,

[18] Counsel Munyaneza Remy, who represents Uwamahoro Dalida Waldha, states that they find in their side that the High Court had jurisdiction to hear the appealed judgment based on article 243 of the Law N° 32/2016 of 28/8/2016 governing persons and family, and article 189 to 195 of the Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure. He continues stating that, the High Court had jurisdiction to admit and hear the appealed judgment, because it is the same Court that took the decisions regarding the children, thus, it has jurisdiction to annul or reverse the concerned decision.

[19] Counsel Munyaneza Remy states also that, the Primary Court decided in merit the case regarding the children, the Intermediate Court of Gasabo sustained it, and High Court took further decisions, consequently, those decisions can not be annulled by the Primary Court, rather the High Court which heard the case, had jurisdiction to reverse it. He states that article 243 of the Law governing persons and family, in the french version they used the word "les mesures" whereas in Kinyarwanda they stated "Urukiko or Court", this is subject to confusion, also that if two opposed parties plead in appeal it is impossible to file for *exparte* application (*requête unilatérale*).

## **DETERMINATION OF THE COURT**

[20] Article 243, paragraph five, of the Law N° 32/2016 of 28/8/2016 governing persons and family, as regarding consequences of the divorce on children provides that "Measures ordered by the court by virtue of this Article are always provisional and can be revoked upon request by any interested party by way of a unilateral petition".

[21] Article 27, litera five (5), of the Law N° 30/2018 of 2/6/2018 determining the jurisdiction of courts provides that " Primary Courts try cases relating to the status of persons and family".

[22] Article 194 of the Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, provides that The applicant or intervening party may, if circumstances have changed, file an application for modification or revocation of the order to the judge who issued it, provided the third party's rights are secured".

[23] The case file indicates that the appealed judgment, filed before the High Court whereby Carpentier Raymond Marcel Patrick sued praying the Court to reverse the decisions taken in cases RCAA00013/2018/HC/KIG, RC00004/2019/HC, RC00010/2019/HC/KIG for the children's sake

with regarding their maintenance and their health care, he requested for joint custody for the guard of the children as an answer to the permanent disputes between him and Uwamahoro Dalida Waldha, the latter prayed the Court to order Carpentier Raymond Marcel Patrick to execute the decision regarding the alimony and school fees, the claim was an *exparte* application too, it is obvious that it was a new claim too, which is not linked to the principal.

[24] The case file indicates also that the High Court is the one which decided at last instance about the divorce of Carpentier Raymond Marcel Patrick and Uwamahoro Dalida Waldha in the judgment RCAA00013/2018/HC/KIG, rendered on 7/12/2018, and took in subsidiary decisions regarding the children, those decisions according to the Law are provisional till the time parties to the case will indicate to the competent Court, that there is a change, and request to reverse the previous decisions.

[25] Basing on the motivations in the previous paragraph, the Court of Appeal finds that the decisions in judgments RC00004/2019/HC, RC00010/2019/HC/KIG, and RC00023/2019/HC/KIG- RC00024/2019/HC/KIG, for which the reversal is requested, were taken in subsidiary and provisionally by the High Court in judgment RCAA00013/2018/HC/KIG, where it adjudicated in merit and principal a divorce case between Carpentier Raymond Marcel Patrick and Uwamahoro Dalida Waldha, that case was adjudicated at last instance and acquired *res judicata* principle, meaning that, the Court adjudicated it at last instance and thus withdrawn it from its jurisdiction, and cannot hear again issues relating to children in case there are new circumstances which may lead to change the decisions related to children taken in a divorce case, because it has no longer jurisdiction to hear that same case. This is emphasized by the fact that children-related cases are of public order, mostly their interests must be protected and provide the parents with the rights to appeal (*Principe du double degré de jurisdiction*) as established by the Law.

[26] The Court of Appeal finds that reference made to comparative Law, it provides that the judge of intermediate Court in charge of family cases for the first instance is competent to hear after the divorce case which became *res judicata* the cases related to parent's right<sup>1</sup>, meaning that the parties to the case must return to the competent Court to hear for the first instance the cases

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<sup>1</sup> L'article 247, alinéa 4, du code civil français dispose que " Il (juge du tribunal de grande instance délégué aux affaires familiales) est seul compétent, après le prononcé du divorce, quelle qu'en soit la cause, pour statuer sur les modalités de l'exercice de l'autorité parentale et sur la modification de la pension alimentaire, ainsi que pour décider de confier les enfants à un tiers. Il statue alors sans formalité et peut être saisi par les parties intéressées sur simple requête". L'article 1084 du code de procédure civile français dispose que " Quand il ya lieu de statuer, après le prononcé du divorce, sur l'exercice de l'autorité parentale, la pension alimentaire ou la contribution à l'entretien et à l'éducation de l'enfant, la demande est présentée, même si un pourvoi en cassation a été formé, au juge aux affaires familiales selon les modalités prévues à la section III du présent chapitre", Code procédure civile annoté, Edition limitée, 108 édition, Dalloz, Paris, 2017, P. 1084.

L'article 302 du code civil belge édicte que " Après la dissolution du mariage par le divorce, l'autorité sur la personne de l'enfant et de l'administration de ses biens sont exercés conjointement par les père et mère ou par celui à qui elles ont été confiées, soit par l'accord des parties dûment entériné conformément à l'article 1258 du code judiciaire, soit par décision ordonnée par le président statuant en référé conformément à l'article 1280 du code judiciaire, sans préjudice de l'article 387 bis du présent code". L'article 1280 du code judiciaire belge dispose que " Le Président du tribunal ou le juge qui en exerce les fonctions statuant en référé, connaît jusqu'à la dissolution du mariage à la demande, soit des parties ou l'une d'elles, soit du procureur du Roi, en tout état de cause, des mesures provisoires relatives à la personne, aux aliments et aux biens, tant des parties que des enfants"

related to persons and family, in case there are new circumstances which may lead to change the decisions related to children taken by The Court in definitive divorce case.

[27] The Court of Appeal finds also that, in this case, the parties to case could request the High Court to reverse the provisional decisions taken in relation to the children all along the hearing of the divorce case, meaning at any time before deciding about divorce, as stated by article 224 and 225 of the Law N° 32/2016 of 28/8/2016 governing persons and family.<sup>2</sup>

[28] The Court of Appeal finds also that, the provisions of article 194 of the Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, suggest that if there are changes, the claim praying the judge to reverse or remove some decisions taken earlier in an *ex parte* application, this is done with regarding the procedure of *ex parte* application only, either for the first instance or at appeal level or even at intervention procedure, meaning that the reversal of the decision taken regarding the children is not processed before the Court which rendered a divorce decision which acquired *res judicata* principle, thus, this article 194 of the Law N° 22/2018 of 29/4/2018 relating to the civil, commercial, labour and administrative procedure, aforementioned is not applicable in this case.

[29] The Court of appeal finds that the Court referred to in paragraph five of article 243 of the Law N° 32/2016 of 28/8/2016 aforementioned, is the Court which has jurisdiction to try for first instance cases related to persons and family, meaning that basing on article 27, paragraph five (5) of the Law N° 30/2018 of 2/6/2018, aforementioned, is the Primary Court which has jurisdiction to try cases whose subject matter is to decide in relation to maintenance of the children because there are new circumstances.

[30] The Court of Appeal finds without merit the argument of the Lawyers for Carpentier Raymond Marcel Patrick and sustained by the Lawyer for Uwamahoro Dalida Waldha, that the High Court which rendered the divorce case and decided upon children, consequently the Primary Court is not competent to hear the *ex parte* application as regards to children because the High Court is superior to it, because in this case the High Court rendered the divorce case at the second appeal level, and decided in subsidiary about issues related to children as it was requested, thus, it can not be considered as if the Primary Court is intended to change the decision of the High Court, because that claim is not attached to the divorce case rendered by the High Court, rather it examines the new circumstances or new facts, which may lead to reverse the decisions taken relating to children, meaning that those circumstances were not examined by the High Court while hearing the divorce case.

[31] Based on all those motivations, the Court of Appeal finds the High Court has no jurisdiction to hear the claim filed by Carpentier Raymond Marcel Patrick and Uwamahoro Dalida Waldha as an *ex parte* application regarding the maintenance of the children, after adjudicating their divorce case, thus, the decisions are taken in appealed judgments RC00004/2019/HC/KIG, RC00010/2019/HC/KIG, and RC00023-00024/2019/HC/KIG, have to be removed, the interested party shall file a new claim before the competent Court.

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<sup>2</sup> article 224 provides that « At any stage of the hearing, the judge may take provisional measures related to the parties, to their children and their property ». whereas article 225 provides that “During divorce proceedings, in the best interest of children, the judge may assign one of the spouses or third party the provisional custody of children and determine the contribution of each spouse to the support of children”.

### **III. DECISION OF THE COURT**

[32] Decides that the High Court had no jurisdiction to try the appealed judgment RC00024/2019/HC/KIG.

[33] Decides to quash decisions taken in judgments to RC00004/2019/HC/KIG, RC00010/2019/HC/KIG, and RC00023-00024/2019/HC/KIG.

[34] The court fee covers the expense in this case.